

MEMORANDUM

Sept. 8, 1988

SUBJECT: Enforcement Actions at Government-Owned
Contractor-Operated Facilities

FROM: Bruce Diamond, Director
Office of Waste Programs Enforcement

TO: Hazardous Waste Management Division Directors
Regions I-X

Regional Counsels
Regions I-X

The purpose of this memorandum is to provide you with copies of three enforcement actions that EPA recently issued to the contract operators of government owned facilities (GOCO). Two of these actions were brought under RCRA Section 3008(a) for violations of RCRA regulatory requirements. The third action is a notification letter for potential liability under CERCLA Section 107. I commend Region V and VI for taking the initiative in issuing these actions as the Assistant Administrator has encouraged in both the January 28, 1988 guidance and in congressional testimony.

To assist you in determining whether an action against a contractor may be an appropriate means of achieving compliance and cleanup at a Federal facility, I have highlighted the rationale used by Regions V and VI for proceeding against the GOCO in each of these cases.

Case #1 - GOCO has primary responsibility for hazardous waste management activities

In the case of the Lone Star Army Ammunition Plant, a RCRA Section 3008(a) complaint was issued to the contractor after it was determined that the contractor had practical and contractual responsibility for the hazardous waste management activities at issue. The ability to correct the violations was within the contractor's control. The complaint included a proposed penalty for the violation.

Case #2 - Prolonged and inconclusive negotiations with the Federal Agency

At the Ravenna Army Ammunition Plant, a RCRA Section 3008(a) complaint was issued to the contractor after lengthy correspondence with the Federal Agency failed to resolve the compliance issue complaint included a proposed penalty for the violation.

Case #3 - GOCO is performing the work

At Air Force Plant #4, the contractor was issued a CERCLA notice letter as a potentially responsible party for the performance of a remedial investigation. In this case, the

-RETYPE FROM THE ORIGINAL-

374

contractor is a long-term operator at the facility; it is believed that the contractor contributed to the contamination problem at the and the contractor is already performing the remedial at the facility; and the contractor is already performing the remedial investigation at the facility.

The decision on whether to pursue a GOCO enforcement action and the timing of that action will always be made on an individual basis as the facts of each case are unique. However, it is useful to build upon practical experience in an effort to anticipate the problems and issues before they occur.

I encourage you to provide the Federal Facility Hazardous Waste Compliance Office (FFHWCO) within OPWE your ideas and comments on the criteria for pursuing enforcement actions under RCRA and CERCLA at GOCO facilities. As I mentioned, the Assistant Administrator is encouraging these actions and the FFHWCO is developing a policy on when they should be pursued. You should relay to the FFHWCO any issues or problems that you have encountered when considering or pursuing enforcement actions at a GOCO facility.

cc: Ed Reich, OECM
Dick Sanderson, OFA

Dec. 27, 1988

PROCEDURES AND CRITERIA FOR DEPARTMENT OF JUSTICE CONCURRENCE
IN EPA ADMINISTRATIVE ORDERS TO FEDERAL AGENCIES

1. Purpose -- The purpose of these Procedures and Criteria is to implement the responsibilities of the Attorney General (as delegated to the Assistant Attorney General for the Land and Natural Resources Division) under section 4(e) of the Superfund Executive Order (EO 12580, Jan. 23, 1987) to review any administrative order ("AO") that the Environmental Protection Agency ("EPA") proposes to issue to a federal agency under sections 104(e)(5)(A) or 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9604(e)(5)(A), 9606(a).

2. Procedure -- The EPA Assistant Administrator for Solid Waste or, if delegated, the EPA Regional Administrator, should submit the proposed AO and a referral letter to:

Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

with a copy to:

Chief
Policy, Legislation and Special Litigation Section
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

The referral letter should include the following information:

-- A statement of the technical basis for the AO, including all necessary findings that support the existence of an imminent and substantial endangerment from an actual or threatened release (for an order issued pursuant to CERCLA § 106(a)), or the basis for believing that there may be a release or threatened release (for an order issued pursuant to CERCLA § 104(e)(5)(A));

-- A statement of EPA's prior dealings with the agency and the efforts that have been made to resolve the matter;

-- A statement of the objections raised by the agency in objecting to compliance and EPA's response to those objections;

-- A statement of whether there are non-federal PRPs or government contractors responsible for the facility and the status of any EPA enforcement efforts against such persons;

-- The name and telephone number of both the EPA attorney with line responsibility for the AO and the EPA Headquarters contact in the Federal Facilities Hazardous Waste Compliance Office within the Office of Waste Programs Enforcement.

Upon receipt, the Policy, Legislation and Special Litigation Section ("PLSL") will promptly (i) enter the proposed AO onto its docket; (ii) review the proposed AO and advise the EPA line attorney and the Federal Facilities Hazardous Waste Compliance Office contact at EPA Headquarters if additional information will be required; (iii) evaluate the proposed AO according to the criteria listed below and prepare a recommendation for the Assistant Attorney General. PLSL will then forward the proposed AO and its recommendation to the Assistant Attorney General for a decision. If the proposed AO and referral letter include all the necessary information, the Assistant Attorney General will make his or her decision within two weeks of receipt of the proposed AO. The decision will be provided to the Assistant Administrator for Solid Waste or the Regional Administrator, as the case may be, in a letter stating the Assistant Attorney General's concurrence, concurrence subject to conditions, or objection to the proposed AO.

In situations where faster action is required (for instance, where there may be an emergency that presents a direct and immediate threat to the public health), PLSL and the Assistant Attorney General will attempt to review the proposed AO within 24 hours. To obtain expedited review, the EPA line attorney or the Federal Facilities Hazardous Waste Compliance Office contact at EPA Headquarters should contact PLSL by telephone at FTS 633-1442 at the earliest possible time.

3. Criteria -- In deciding whether to issue the proposed AO, the Assistant Attorney General will consider the following factors:

- whether the proposed AO is consistent with EPA's statutory authority;
- the extent of prior consultation with the affected federal agency at the appropriate levels of authority;
- whether any non-federal PRP has responsibility that affects appropriateness of the issuance of an AO to the federal agency.

In addition to the foregoing, EPA and the Department of Justice may raise, and the Assistant Attorney General may consider, any other factors that may be relevant under the circumstances.

DATED:

ROGER J. MARZULLA
Assistant Attorney General